Testimony of J. Mark Robinson
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before the
Senate Committee on Energy and Natural Resources

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Mr. Chairman and Members of the Committee:

My name is Mark Robinson, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss proposed legislation relating to the Commission's hydropower licensing program. As a member of the Commission's staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

My testimony today will provide a brief overview of the hydropower licensing program. I will then focus on three proposed pieces of legislation: S.597, the Comprehensive and Balanced Energy Policy Act of 2001; S.388, the National Energy Security Act of 2001; and S.71, the Hydroelectric Licensing Process Improvement Act of 2001. Because S.71 is incorporated in its entirety in S.388, I will address the subject matter of S.71 during my discussion of S.388.

1. The Commission's Licensing Program

The Commission currently regulates over 1,600 hydropower projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). Non-federal hydropower projects are required to obtain Commission authorization if they are on lands or waters subject to Congress' authority. Those projects represent more than half of the Nation's approximately 100 gigawatts of hydroelectric capacity and over 5 percent of all electric power generated in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

The Commission's hydropower work generally falls into three categories of activities. First, the Commission licenses and relicenses projects. Relicensing involves projects that originally were licensed 30 to 50 years ago. The Commission's second role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

The Commission is in the second year of a 10-year period (CY2000 to CY2010) during which 218 applications for hydropower relicenses are due to be filed. The

Commission has already received 84 of these relicense applications. This group of projects has a combined capacity of approximately 22,000 megawatts (MW), or 20 percent of the Nation's installed hydroelectric capacity. Approximately forty percent of these 218 projects will have filed their relicense applications by the beginning of 2002.

Over the last three decades, the enactment of numerous environmental, land use, and other laws, and new interpretations of certain provisions of the FPA, have significantly affected the Commission's ability to control the timing of licensing and the conditions of a license. Under the standards of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Electric Consumers Protection Act of 1986 (ECPA) amended the FPA to require the Commission to give "equal consideration" to developmental and non-developmental values.

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing developmental and environmental interests, various statutory requirements give other agencies a powerful role in the licensing process. Among others, those requirements include:

- Section 4(e) of the FPA, which authorizes federal resource agencies such as the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise.

- Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions.

- Section 10(j) of the FPA, which in essence establishes a presumption for inclusion of Federal and State fish and wildlife agencies' recommendations to protect fish and wildlife.

- Section 401 of the Clean Water Act, which authorizes States to impose mandatory conditions as part of the State water quality certification process.

- The Coastal Zone Management Act, which requires that projects affecting coastal resources be consistent with State management programs.

- The Endangered Species Act, which directs the Departments of the Interior and Commerce to propose measures to protect threatened and endangered species.

! The National Historic Preservation Act, which requires Commission consultation with Federal and State authorities to protect historic sites.

There have been three important court decisions concerning the roles of the Commission and the resource agencies under these statutes.

! In PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) (Jefferson County), the Supreme Court held that a State acting under the CWA could regulate not only water quality (such as the physical and chemical composition of the water), but water quantity (that is, the amount of water released by a project), as well as State-designated water uses (fishing, boating, etc.). It is important to note that the Court specifically acknowledged that its decision did not address the interaction of the CWA and the FPA, since no license had been issued for the project in question. Its decision therefore did not discuss which regulatory scheme would prevail in the event of a direct and critical conflict.

! In American Rivers [I] v. FERC, 129 F.3d 99 (2nd Cir. 1997), the Court held that the Commission lacked authority to determine whether conditions submitted by State agencies pursuant to Section 401 of the Clean Water Act were beyond the

scope of that section. The court held that challenges to such conditions were to be resolved instead by the courts.

! Finally, in American Rivers [II] v. FERC, 187 F.3d 1007 (9th Cir 1999), the Court ruled that the Commission lacked authority in individual cases to determine whether prescriptions submitted under color of Section 18 of the FPA were in fact fishways. As in the Second Circuit case, the Court held that challenges to a fishway prescription were to be resolved by the courts, not the Commission. (On December 22, 2000, the Departments of the Interior and Commerce issued a joint Notice of Proposed Interagency Policy on the Prescription of Fishways. The Commission staff filed comments noting that the unilaterally-developed policy would define the term "fishway" in an extremely broad manner that in staff's view is inconsistent with the definition of that term enacted by Congress in the Energy Policy Act of 1992).

As a result of these judicial rulings, if the Commission were to conclude that one or more mandatory conditions would render a project inconsistent with the public interest, its only recourse would be to deny the license application. Not only is this a blunt instrument, but in most relicense proceedings denial is not a viable alternative.

2. The Commission's Licensing Process

The Commission currently uses two different processes in licensing: the "traditional" process and the "alternative" process. Under the alternative process, pre-filing consultation and environmental review can be integrated and proceed concurrently, in a collaborative manner, thereby dramatically shortening the processing time for an application.

Earlier this year, Commission staff submitted a report of the hydropower program to Congress, as required by Section 603 of the Energy Act of 2000 (the Section 603 Report). In the report, the staff found that using the traditional process takes approximately 23 months longer than the alternative licensing process.

Further, for the traditional process, the average cost of application preparation is $109/kW, and the cost for protection, mitigation, and enhancement measures is $264/kW. In contrast, for the alternative licensing process, the average costs for application preparation and protection, mitigation and enhancement measures are $39/kW and $58/kW, respectively -- substantially lower than for the traditional process.

The Commission has worked to improve the licensing process by making its regulations more clear and specific, enhancing opportunities for stakeholder participation, and providing flexibility to license applicants and others to design collaborative efforts that meet the needs of all participants. In addition, Commission staff routinely holds "outreach" meetings throughout the country to inform all stakeholders about the licensing process, and has taken an active role in facilitating settlements and introducing alternative dispute resolution procedures. The staff has also participated in Interagency training on hydropower licensing, and in the Electric Power Research Institute's National Review Group, which shares "lessons learned" in the hydropower licensing process.

3. The Proposed Legislation

A. S.597

S.597 contains three provisions regarding the relicensing of hydroelectric projects, which I will discuss in turn.

i. Section 701 would amend FPA Section 4(e) to provide that, where a licensee proposes an alternative to a mandatory condition proposed by the Secretary with supervision over a reservation on which a hydropower project is located, the Secretary

shall accept the alternative condition, if the Secretary determines that the alternative would provide equal or greater protection than the original condition, is based on sound science, and will either cost less than the original condition or will result in a smaller loss of generating capacity than would the original condition.

I support the idea of greater interaction between the resource agencies and licensees in the development of environmental measures, which Section 701 could encourage. However, given that this section leaves to the resource agencies the discretion as to whether to accept an alternative condition proposed by a licensee, I am uncertain that this measure would have much impact. The resource agencies already possess the ability to change their mandatory conditions if the applicant convinces them that an alternative is preferable.

In addition, this proposal appears too limited to the extent that it only requires consideration of measures from applicants that provide "equal or greater protection" than the condition deemed necessary by the resource agencies. This would mean that the agencies would not have to consider, for example, an alternative that cut costs by 90 percent or that sharply increased capacity, but had 99 percent of the environmental protection. Also, the proposal does not provide for consideration of a measure's effect on other project purposes such as flood control, irrigation, and recreation.

Finally, while as a general matter I support proposals to increase communications among interested parties to a licensing proceeding, I am concerned that, individually and especially in the aggregate, such processes may add burdensome, time-consuming steps to the licensing process, increasing its costliness and further delaying Commission action.

ii. Section 702 would amend the FPA to provide that the Commission pass on directly to federal resource agencies that portion of the annual charges collected by the Commission that is attributable to the costs incurred by those agencies in administering Part I of the FPA.

Commission staff included in the Section 603 report a recommendation similar to Section 702. Chairman Hébert has supported that recommendation, and I do so as well. Ensuring that Federal agencies recover appropriated funds spent for the licensing process would support the federal agencies' participation in that process.

However, I am concerned that, as drafted, the bill would allow the Federal resource agencies to use annual charge funds not only to administer Part I of the FPA, but also for environmental enhancements, including measures that have no nexus to the project. This greatly expands the current scope of the annual charges provision, which I believe is intended to cover administrative costs, not to pay for environmental measures.

iii. Section 703 provides that, within six months of the date of enactment of the legislation, the Commission shall submit to Congress a study, prepared in consultation with the Secretaries of Commerce, the Interior, and Agriculture, analyzing the length of time for issuing new licenses, the additional cost to licensees attributable to new license conditions, the change in generating capacity attributable to new license conditions; the environmental benefits achieved by new license conditions; and litigation arising from relicensing proceedings.

Commission staff is always prepared to submit to Congress whatever information Congress deems necessary. I note, however, that the first three items are discussed in the recent Section 603 report. With regard to the environmental benefits achieved by new license conditions, Commission staff has begun reviewing methods for determining the effectiveness of license conditions. There does not appear to be a general agreement as to how to quantify environmental benefits (and, indeed, the value of particular benefits may vary from project to project), it would be difficult, if not impossible, to develop useful figures regarding the benefits of individual license conditions. Litigation arising from relicensing proceedings (which occurs in only a minority of cases) tends to be based on the facts of each case, and may not lead to general conclusions. Thus, I am uncertain that the proposed additional study will yield useful results.

B. S.388 (including S.71)

i. Section 724 of S.388 would amend the FPA with the respect to mandatory license conditions submitted by the Secretaries of the Interior and Commerce under Sections 4(e) and 18 of that Act, and by Federal agencies supervising lands on which project works are located. The bill would require them to take into consideration various factors, including the impacts of proposed conditions on economic and power values, electric generation capacity and system reliability, air quality, drinking water, flood control, irrigation, navigation, or recreation water supply, compatibility with other license conditions, and means to ensure that conditions address only direct project environmental impacts at the lowest project cost. The Departments would be required to provide written documentation for their conditions, submit them to scientific review, and provide administrative review of proposed conditions.

Section 724 would also provide for the Commission to establish a deadline for the submittal of mandatory conditions in each case, to be no later than one year after the Commission issues notice that a license application is ready for environmental review. If an agency fails to submit a final condition by the deadline, the agency loses the authority

to recommend or establish license conditions. The Commission must conduct an economic analysis of conditions proposed by consulting agencies, and, upon request of license applicants, must make a written determination whether such conditions are in the public interest, were subjected to scientific review, relate to direct project impacts, are reasonable and supported by substantial evidence, and are consistent with the FPA and other license conditions.

I support the purpose of the bill, which is to promote sensible and timely decisions by all agencies involved in licensing matters. Reasoned decision-making with respect to mandatory conditions must be the responsibility of the resource agencies, given the Commission's very limited discretion with respect to such conditions. As Congress considers any legislation, however, it should be careful to ensure that any procedures that could add time or expense to the process are justified by improved outcomes.

Several portions of Section 724 of S.388 are consistent with the recommendations in the Section 603 Report. For instance, having the resource agencies consider economic as well as environmental impacts would lead to better-informed determinations on what mandatory conditions are in the public interest. The Commission is required to take into account a range of public interest factors for matters within its discretion. The requirement for resource agencies to document their decision making is essential for due

process. See Bangor Hydroelectric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996). Establishing reasonable deadlines for submission of conditions (as the Commission's regulations now provide) could help make the licensing process more timely. These sensible requirements should make licensing more timely and efficient, while supporting well-reasoned licensing decisions.

As Commission staff recommended in the Section 603 report, I believe that the best way to rationalize the hydropower licensing process would be to retain the authority of Federal resource agencies to impose mandatory license conditions, but to make that authority subject to a statutory reservation of Commission authority to reject or modify the conditions based on inconsistency with the Commission's overall public interest determination.

In addition, Commission staff recommended that Congress provide that the Commission license be the only federal authorization required to operate the project, e.g., special use authorizations for projects on Forest Service lands and similar authorizations would be eliminated. A single administrative process would be established by the Commission to address all Federal agency issues in a licensing case, with schedules and deadlines established by the Commission, and with one administrative record compiled by the Commission in consultation with the other Federal agencies. The Commission would

prepare a single NEPA document. The Federal agencies would not be required to adopt the Commission's conclusions, but would have to provide for the record their own analysis and conclusions based on the evidentiary record. The agencies' analyses and conclusions would be included in the record of the Commission's order acting on the application, and judicial review would be obtained by seeking rehearing of the Commission's order.

These measures, if enacted, could shorten the license process, give greater certainty to licensees and other participants, and ensure that the FPA's public interest standards are used in developing all parts of a license.

Staff recommended that, should Congress not allow the Commission to determine whether mandatory conditions imposed by other Federal agencies are in the public interest, Congress could nonetheless improve the mandatory conditioning process by requiring resource agencies to consider the full panoply of public interest values, support their conditions on the record, and provide a clear administrative appeal process. The Section 603 Report supports this by noting that the costs for protection, mitigation, and enhancement measures for licenses containing Section 4(e) and 18 mandatory conditions ($590/kW) were 2.7 times the costs for licenses that did not contain those conditions ($218/kW). The Commission staff does not routinely highlight disagreements with

mandatory conditions. However, the report concluded that, in the 12 percent of cases where staff did so, many of the resource agencies' conditions were substantially more expensive than conditions that staff thought adequate to protect environmental resources. Requiring agencies to better document and support mandatory conditions could help ameliorate this problem.

ii. Section 725 of S.388 provides that the Commission shall be the lead agency for environmental review under the NEPA, and that other Federal agencies will not perform additional environmental review.

As noted above, Commission staff has recommended that the Commission prepare the sole NEPA document in licensing proceedings. At the same time, I do not want to eliminate the ability of individual agencies to perform the environmental review that they need to support their portion of the licensing process in a timely fashion.

iii. Section 726 of S.388 would require the Commission to prepare and submit to Congress a study of the feasibility of establishing a separate licensing procedure for small hydroelectric projects. As a general matter, Commission staff does not support differing regulation based on the size of hydroelectric projects. A project with a small capacity can have a significant impact both at the project site and beyond its immediate environs.

Pursuant to the mandates of the Federal Power Act, the Commission evaluates that impact, and, in rendering a licensing decision, gives equal consideration to development interests and environmental resources in determining whether, and with what requirements, to authorize hydropower development. The Commission's current licensing "exemption" program for projects 5-MW or less, pursuant to Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, has demonstrated the difficulty of establishing diminished requirements for this group of projects. Of course, we are prepared to study this matter and report back to Congress.

4. Conclusion

Commission staff is well aware of the importance of hydropower, and of the significant role the Commission plays in licensing and overseeing crucial hydropower projects. We also recognize that the hydropower licensing process can be long and costly. The Commission and its staff will do everything we can to improve that process. At the same time, we are prepared to work with Congress and other agencies to craft legislative solutions. Together, we can develop the efficient, comprehensive licensing process that our Nation's energy needs demand.

Thank you. I will be pleased to answer any questions you may have.